IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 366-367

BAY RIDGE OPERATING CO., INC.,
Petitioner,

v.

JAMES AARON, ALBERT ALSTON, JAMES PHILIP BROOKS, LOUIS CARRINGTON, ALBERT GREEN, JAMES HENDRIX, AUSTIN JOHNSON, CARL I. ROPER, MARS STEPHENS, and NATHANIEL TOLBERT.

HURON STEVEDORING CORP.,
Petitioner,

v.

LEO BLUE, NATHANIEL DIXON, CHRISTIAN ELLIOTT, TONY FLEETWOOD, JAMES FULLER, JOSEPH J. JOHNSON, SHERMAN McGEE, JOSEPH SHORT, ALONZO E. STEELE, and WHITFIELD TOPPIN.

MOTION AND BRIEF ON BEHALF OF THE INTERNATIONAL LONGSHOREMENS ASSOCIATION (A.F.L.) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INTERNATIONAL LONGSHOREMENS ASSOCIATION,
Amicus Curiae.

LOUIS WALDMAN,
Of the New York Bar,
Counsel.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Now comes the International Longshoremens Association (A.F.L.), by its attorney, and respectfully moves for leave to file the attached brief as *Amicus Curiae* in the above-entitled cause, in support of the petitioners' petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. As grounds for said motion, movant shows:

1. The International Longshoremens Association, hereinafter referred to as the I.L.A., an unincorporated association, is a labor union affiliated with the American Federation of Labor. It consists of some 500 locals in the ports of the United States and Canada, with a membership of approximately 80,000. Its membership in the Port of New York numbers approximately 30,000. The plaintiffs are longshoremen in the Port of New York and are members of the I.L.A. The I.L.A., through its affiliated locals, is the collective bargaining agency for its members. The I.L.A. has been negotiating and making collective bargaining agreements with employers governing the wages, and terms and conditions of employment of its members for more than 30 years. For this reason it has a vital interest in the subject matter of this case.

2. The petitioners, by the Solicitor General, have filed herein a petition that Writs of Certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, which reversed a judgment in favor of the defendants entered by the United States District Court for the Southern District of New York. The movant, the I.L.A., is desirous to support that petition.

3. The Solicitor General, as counsel for the petitioners, has given his consent to the filing of this brief. Counsel for the plaintiffs-respondents herein, has refused his consent.

4. Special reasons in support of this motion are set out in the accompanying brief.

Respectfully submitted,

LOUIS WALDMAN,
Counsel for
International Longshoremens Association,
A.F.L.

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BRIEF ON BEHALF OF INTERNATIONAL LONGSHOREMENS ASSOCIATION (A.F.L.) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Interest of the International Longshoremens Association

The International Longshoremens Association (A.F.L.), hereinafter referred to as the I.L.A., supports petitioners' application for Writs of Certiorari herein, because under the decision of the court below, the economic and social gains it has made for its membership as a whole over a period of 25 years would be seriously undermined. Its capacity to negotiate and reach agreements in good faith for the betterment of the general conditions of its members, including the fixing of wage scales and overtime rates which in this industry are over and above and superior to the standards set by the Fair Labor Standards Act, would be destroyed. Elements of uncertainty would be introduced into the processes of collective bargaining. The promises of the parties solemnly entered into and relied upon in working out an industrial code for the industry, would no longer have that moral authority and economic predictability which is a basic and essential requirement for effective pursuit of the processes of collective bargaining.

The rates of pay agreed upon between the union and the employers in the Port of New York, as evidenced in written contracts going as far back as 1916, demonstrate the evolution of an industrial relationship between a strong well-organized labor union on the one hand and a strong well-organized group of employers on the other. The union vigorously pursuing a course calculated to improve the standards and conditions of employment of its members, and the organized employers acting, in their own interest, through the New York Shipping Association, have, through the years, built an efficient and prosperous industry capa-

ble of yielding a reasonable profit to the owners, and those ever higher levels of wages and working conditions which the union has demanded and secured over the years.

The union negotiates agreements with the employers for 8 general classifications of employees. The agreements cover the following general classifications: General Cargo; Cargo Repairmen; Checkers; Clerking; Port Watchmen; General Maintenance Workers; General Mechanic and Miscellaneous Workers; Horse and Cattle Feeders, Grain Ceilers and Marine Carpenters. These 8 agreements take up 54 pages of small type in the booklet entitled "Agreements Negotiated by the New York Shipping Association with the International Longshoremens Association • • • Effective October 1, 1943," which forms a part of Defendants' Exhibit A. The agreement which was considered in the above-entitled cases was the General Cargo Agreement.

The basic scale of wages under the 1943 General Cargo Agreement, ranged from $1.25 per hour to $2.50 per hour. These were the straight time hourly rates. The overtime hourly rates provided for in the agreement ranged from $1.87½ to $3.75. The overtime hourly rates were fixed in this agreement, as indeed, in the collective agreements which preceded and followed it, at one and one-half times or 150 percent of the contract straight time hourly rate (except for some negligible classification where there was a very slight deviation).

In 1916 the General Cargo Agreement provided for basic straight time hourly rates of $.40 and overtime rates for night work of $.60 per hour. The basic hourly rate for explosives was $.80 per hour.

Wage scales are of course not the be all and end all of a collective bargaining agreement. Like most collective agreements negotiated by strong unions, the 1943 agreement also contains items dealing with the health, comfort

and convenience of the workers, items dealing with human rights on the job as against the arbitrary powers of management, and items concerning machinery for arbitration. The 1943 General Cargo Agreement covers 15½ pages of small print in the booklet referred to *supra*.

It contains a provision for the preferential shop.

It fixes basic working hours and provides not merely for a maximum working week, but for a maximum basic working day.

It specifies meal hours and prohibits work during such hours, except for certain emergencies.

It provides for legal holidays.

It then sets forth that

> "straight time rate shall be paid for any work performed from 8 A.M. to 12 Noon and from 1 P.M. to 5 P.M. Monday to Friday, inclusive, and from 8 A.M. to 12 Noon Saturday. All other time, including meal hours and the legal holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate. The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until men are relieved."

The agreement then sets forth the wage scales for 8 types of cargo. For each of these 8 types, it provides a straight time hourly rate and an overtime hourly rate, which is 150 percent of the straight time hourly rate.

It will be observed, therefore, that the collective agreement provides for overtime pay, not merely for hours worked in excess of the basic working week, but for all time worked outside of certain specified daytime hours.

Provision is then made that the employer shall supply certain work necessities and for regular and convenient payment of wages.

"Shaping time", a mode of employment peculiar to the longshore industry, is regulated. In order to prevent, insofar as can be done, abuse of the "shape" as a form of hiring, the contract provides that under certain conditions a worker who is chosen at the "shape" must be paid a minimum of either 2 or 4 hours pay, as the case may be.

There is a provision for suitable shelter during bad weather.

Then follow almost two pages regulating the minimum number of men in gangs loading and discharging various types of cargo, with a provision for immediate ruling on any disputed cases that may arise under this clause.

As a protection to the health of the workers, there are provisions concerning the maximum weights which may be lifted with and without the use of machinery. Similarly the agreement requires that the employer furnish clean drinking water and adequate sanitary facilities to the men; prohibits the use of intoxicants; and makes provision against shirking or pilfering.

There is a pledge that neither party to the agreement will discriminate against members of the other party.

Elaborate provision is made for arbitration of all disputes which may arise under the agreement.

The agreement here so briefly outlined, reflects the aspirations of the membership of the I.L.A. through the years. The increase in wages between 1916 and the date of this agreement, is paralleled by a reduction in working hours. The 1916 agreement provides for a ten hour day, while this agreement provides for an 8 hour day. The 1916 agreement covers 1½ typewritten pages. This agreement covers 15 printed pages. Through the quarter of a century that passed between the writing of the 1916

and the 1943 agreements, the union was building up, through the collective agreements, a code of labor relations in the interest of its members. No separate part of that code stands by itself. No separate part of that code was negotiated and won by the union without reference to and relationship to the other parts. No part of that code so painfully built through the years, was granted by the employers without reference to and relation to the other parts. The developing character of the agreement through the years, its growing concern with matters in addition to wages, the extension of its protections over more and more aspects of the workers employment, reflects the processes of collective bargaining at their best.

In these agreements, over the years, the union fixed the basic and regular rates of pay, and the overtime rates, and they were understood to be the regular rates of pay and the overtime rates of pay by the parties to the agreements. Here was no development forced upon the union and the employers by the Act, but by the collective strength of the workers through the I.L.A.

Overtime was fixed at time and one-half the regular rates. No intricate computation to arrive at the overtime was necessary. The rates were clearly set forth, and no member of the union has ever expected overtime on overtime. No employer has ever expected that there would be a demand for it.

The union, speaking for its entire membership, cannot allow some of its members to repudiate individually an agreement as to what constitutes regular and overtime rates to which they, together with their fellow workers jointly agreed through the orderly processes of collective bargaining over a long period of years. For the union

to stand by idly when such repudiation is attempted, would be to destroy the very foundation of bona fide collective bargaining.

The basic rates here involved are far higher than those required by the Fair Labor Standards Act. Without collective bargaining these very plaintiffs who now seek overtime on overtime rates ranging up to $3.75 per hour during the period in suit might, like millions of other American workers, still be working at the $.40 per hour minimum provided by the Act.

The present agreement between I.L.A. and the New York Shipping Association expires by its terms in August, 1948. One need not be a prophet to expect that the employers will not be ready to renew an agreement which, if the decision of the court below should stand, will have the effect of causing them to pay overtime on overtime. Indeed when it became known in 1945 that such a suit as the one now in question would be filed, the employers insisted upon inserting in the agreement a provision for renegotiation in the event that the overtime arrangements in this industry should be construed by the courts in such a manner as to negate the intent of the parties. The union resisted such a clause, but finally was compelled, as a part of the price of securing agreement, to assent to its inclusion.

The members of the I.L.A. well know what disaster such renegotiation may bring to them and how greatly they can be harmed if the overtime provisions which they have fought for for so many years and which are so far superior to the requirements of the F.L.S.A. should be changed. (See testimony of Joseph P. Ryan, president of the I.L.A., Record, 167-197.)

The trial court fully appreciated the danger, stating, in its opinion:

"It is clear that the application of either of plaintiffs' formulae to the Nation's wage bill retrospectively would create havoc with established labor relations, put collective bargaining in the category of a device for obtaining money under false pretenses and probably strain the resources of a substantial proportion of American industry.

"Such catastrophic results are inevitable once we accept plaintiffs' underlying premise—that in determining the 'regular rate' intended by Congress, we must close our eyes to the contract in good faith negotiated between employer and employees and look only to the actual work pattern. Upon such a premise, genuine collective bargaining cannot live." (Record, 586)

The danger to the longshoremen is real—and immediate. The very foundations of free collective bargaining are threatened—and we cannot believe that it was the purpose of Congress that the F.L.S.A. should be construed so as to make it such a threat.

It is a matter of historical record that it was the labor movement, of which the I.L.A. is a part, which was the prime mover in securing, first by collective agreement, and then through the reinforcement of law, a floor under wages and a ceiling over hours. The Fair Labor Standards Act was finally passed by Congress as the result of a public opinion which demanded for the unorganized workers at least some of the gains which had been won by organized labor.

It is inconceivable that it was the intent of organized labor, in supporting such legislation, to have it supplant free collective bargaining, or that it was the purpose of Congress that the standards set by such legislation should supplant the superior standards previously set by collective bargaining.

Congress, in passing the Fair Labor Standards Act, had for its overall purpose advancement of the social and economic position of labor by setting a floor under wages and a ceiling on hours. But, surely, it never contemplated that the law should be so construed as to hurt labor.

In the longshore industry particularly would the workers be hurt by such a construction of the Act, because it would cut the groundwork from under those clauses of their agreements which were especially designed to meet the problems of their industry and to meet their problems as workers in that industry. For example, the longshore industry unfortunately does not provide steady employment for its workers. All too often it does not provide a full week of work. Under the agreements which the longshoremen have won for themselves, under the agreement which the plaintiffs ask this court to ignore, a longshoreman working from noon to 8 P.M. three days in the week for a total of 24 hours, will receive not 24 times the basic hourly rate of pay, but will receive instead 30 times the basic hourly rate of pay. Thus workers who find themselves, because of the peculiar conditions of the longshore industry, in the position of having to work 7 or 8 hours a day for a total of less than 40 hours a week, nevertheless secure overtime pay for a considerable portion of the hours they do work. As the trial court found: "There was 8.50 times as much contractual 'overtime' as there was overtime, measured by the number of hours in excess of 40 worked for one employer (Record, 607). It is this economic gain, among others, which is threatened.

The union, ever since its existence, and by written contract since 1916, has consistently fought to maintain payment of overtime for all work done outside of the specified regular daytime hours.

This type of overtime pay is not peculiar to the longshore industry; there are thousands of collective agreements in which overtime is likewise provided for time worked outside regular daytime hours. In the longshore industry, however, the peculiar nature of the industry makes such a provision especially important, for in the longshore industry there is constant pressure on the employers to work around the clock.

To make it possible for its members to live normal lives like their fellow citizens, to work during the hours when other men work, to spend time with their families, the union has had to resist this pressure consistently. It has placed high penalty overtime rates on all hours outside the daytime hours, so as to make around the clock work too expensive for the employers, except in case of absolute need. This device has proved successful in concentrating longshore work during the regular daytime hours.

The trial court found, as a fact, that concentration of work during the basic working day was almost 8 times as great as during the other 16 hours of the day from 1932 to 1937. During the 10 months' period from passage of F.L.S.A. to shortly before the outbreak of the war, this concentration was 6 times as great. Even during the last full war year, when pressure of round the clock work was greatly increased, due to the need of getting ships out of the port as quickly as possible, concentration of work was 2.4 times as great during the daytime hours as during the other 16 hours of the day (Record, 608).

If the decision of the Circuit Court of Appeals should stand, this concentration of work during the daytime hours, for which the union has so long fought, would be menaced.

It must be recognized that it is difficult enough for a union, in negotiations with its employers, to secure for its

members conditions which are an advance upon those which generally prevail in American industry, even where its position on the merits is unassailable. It would be far more difficult for the union to secure such conditions when the employers can point to a law that piles a statutory penalty on a penalty for overtime already exacted by the workers.

The I.L.A. and its members should not be placed in the position of having to resist the employers' demand for a revision of the overtime provisions in the contract.

The Issue

The ultimate issue involved in these cases, is whether the "straight time" rates of pay for the basic working day as defined in the collective bargaining agreement between the New York Shipping Association and the I.L.A., are regular rates of pay within the meaning of the Fair Labor Standards Act.

During the period in suit, if a man worked 41 hours, 39 of them within the basic working day, and 2 hours outside the basic working day, his compensation was 39 times the straight time hourly rate plus two times the contractual overtime rate. If a man worked 41 hours, all of them outside the basic working day, he was compensated for all 41 hours at the contractual overtime rate.

The District Court in its opinion, held that "the collectively bargained agreement established a regular rate" (Record, 591) and concluded, that the "straight time" hourly rates set forth in the collective bargaining agreements constituted the "regular rates" at which respondents were employed and that the employers had complied with the requirements of Section 7a of the Fair Labor

Standards Act, except in certain minor respects, which are not in dispute (Record, 617).

The court below disagreed with the trial judge. While holding that his findings "are supported by the evidence", it reversed him, and set up a different "regular rate" of pay than that provided in the contract.

Specification of Errors to Be Urged

I

The court below erred in failing to hold that the "straight time" hourly rates set forth in the collective bargaining agreements governing the terms and conditions of employment in the longshore industry in the Port of New York, in which respondents and other longshoremen were employed during the period in suit, were the "regular rates" at which they were employed within the meaning of Section 7a of the F.L.S.A., for the reasons that follow.

(a) As a matter of law, the I.L.A. and the employers had a right to contract for a regular rate and an overtime rate so long as it was not less than the statutory 150 percent of the regular rate. Employer and employee may establish the regular rate by contract. *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, 631. Public policy favors collective barganing. *29 U. S. Code, Sec. 151. Labor Management Relations Act of 1947.* It follows as a matter of public policy, therefore, that the employer represented by his trade association and the employee represented by his union, may establish the regular rate by contract.

Moreover, Congress in the F.L.S.A., indicated its belief that the unions have a protective function with respect to their members, upon which Congress was willing to rely. Thus, in Section 7b, which provides for certain exemptions from the overtime provisions of the Act, these exemptions apply not where individual contracts have been entered into by the employer and employee, but only where collective agreements with a bona fide union have been entered into.

(b) The provisions of the agreement measuring overtime by all hours worked outside of certain specified daytime hours was consonant with the purpose of Congress, and effectuated the purposes of the Act.

The Supreme Court has stated that the Act had a "dual purpose of inducing the employer to reduce the hours of work and to employ more men and of compensating the employees for the burden of a long work week". *Walling* v. *Youngerman Reynolds Hardwood Company*, 325 U. S. 419, 423.

From the very beginning of American industrial history, organized labor fought for the shorter working day and its chief device toward that end was the establishment of a punitive rate—generally 150% of the regular rate—for overtime (Record, 328, 421, *et seq.*). Congress did not, with the passage of the F.L.S.A., introduce a new concept into American industry but adopted a concept which was already firmly rooted in the unionized trades, namely that a premium of 50% for overtime work would act as a deterrent to working a long day or a long week, and would compensate the employees for the burden of a long work week.

It could not have been the purpose of Congress to supplant overtime arrangements already a part of the American industrial pattern, which also had as their objective the imposition of a penalty premium of 50% on overtime as a deterrent to working a long day or a long week, but rather to introduce this means of controlling the long day or long week, where the penalty premium was not already in effect.

Moreover, Congress must be presumed to have known that the unionized trades had, over a period of years, worked out overtime arrangements which were more favorable to the workers in them, than the 50 percent penalty premium on excessive hours—that for example some unionized trades imposed a penalty premium of 100 percent on overtime hours and that a number of the best organized trades imposed penalty premiums not merely for excessive hours but for hours outside of a regular or normal, or basic working day. It could certainly not have been the purpose of Congress that the F.L.S.A. be so interpreted as to place additional statutory overtime penalties on industries which had already granted to their employees, as a result of union insistence, more favorable overtime provisions than the statute was to provide. The purpose of Congress was to limit the working day by imposition of a penalty premium of 50 percent for overtime. The trial court found as a fact, that in the Port of New York, "the 50 percent overriding charge for work done during 'overtime' hours, is a deterrent because of the added cost * * *" and that "the steamship companies in the Port of New York, have preferred to confine the handling of cargo to 'straight time hours' to the greatest possible extent" (Record, 603).

The trial court further found that "the objective of organized labor has been to shorten the total number of weekly hours * * *. A mechanism for accomplishing this result has frequently been to schedule an approved tour of daily hours to be compensated for at a straight time rate and to classify all other hours as overtime hours compensated at an overtime rate. The employment of the 50 percent premium for such overtime hours, was designed to constitute a deterrent and not a prohibition. Such 50 percent premium in the longshore industry has proved to be effective as a deterrent and is responsible for the high degree of concentration of longshore work in the Port of New York to the basic working day" (Record, 612).

The trial court's findings of fact based on statistical studies introduced into evidence, would also indicate that the overtime device used in the longshore industry tends to reduce hours of work and to cause the employment of more men. For example, the court found that during the 10 month period from October 24, 1938, the effective date of the F.L.S.A., to August 31, 1939, shortly before the outbreak of the war, only 8.05% of the longshoremen who worked in the Port of New York, worked more than 40 hours a week for one employer. Similarly the trial court found that the percentage of total hours worked for one employer, which is represented by work in excess of 40 hours per week, was 2.94 percent (Record, 607). Similarly, the court found that during the last full year of war experience before V.E. Day, 44.5 percent of total "overtime" man hours worked between 5 P.M. and 8 A.M. (exclusive of Sundays and holidays) was worked by men who had done no work previously during the straight time working day (Record, 607, 608).

All these figures lead irresistibly to the conclusion that the overtime device used in the longshore industry had the result of inducing the employers "to employ more men". Moreover, under the contract, the men were compensated for the burden of long hours at the statutory rate.

Thus the "dual purpose" of the Act has been achieved under the collective agreement in the Port of New York and the method of overtime compensation adopted in the Port of New York is therefore in consonance with the purpose of Congress.

(c) The basic working day of 8 daytime hours as set forth in the collective agreement, was the regular working day for the longshore industry, both by the intention of the parties and in actual fact.

The irregular character of work in the longshore industry has posed a constant challenge to the union to bring about as high a degree of regularity as possible. It has succeeded in doing so, by securing overtime compensation for hours worked outside the basic day time hours, so that there is a high degree of concentration of work during the daytime hours. In terms of the industry as a whole and in terms of the membership of the union as a whole (which is to say in terms of the New York longshore workers as a whole), these daytime hours have become the regular hours because all other hours worked required the payment of punitive overtime.

Thus during the years from 1932 to 1937, inclusive, work performed between 5 P.M. and 8 A.M., exclusive of Sundays and holidays, constituted 15.13 percent of the total man hours worked. For the ten months between the passage of the F.L.S.A. and August 1, 1939, shortly before the outbreak of the war, work performed between

5 P.M. and 8 A.M., exclusive of Sundays and holidays, constituted 17.89 percent of total man hours. Even during the war, work performed during these nighttime hours, amounted to only 25 percent of total man hours (Record, 606, 607).

As the Supreme Court stated in *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, at pages 634, 635,

> "the problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable and that which it was unwise for Congress to do, this court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act * * *".

We respectfully submit that in the light of the facts in this case, it would require "an inflexible and artificial interpretation of The Act" to hold that the straight time daytime hours are not the regular hours within the meaning of the Act. The trial court was amply justified in finding that "'the straight time hourly rate' * * * constituted the regular rate at which plaintiffs were employed * * *" (Record, 617).

II

The court below also erred in failing to hold that payment of one and one-half-times the "straight time" rates set forth in the collective bargaining agreements for all work performed outside the 40 basic hours—the "straight time hours"—in any work week in the period in suit satisfied the requirements of Section 7a of the F.L.S.A. with respect to payment of overtime compensation, for the reasons that follow:

(a) The contractual overtime rate was a true overtime rate by whatever test may be applied and therefore not the regular rate. As already pointed out, it had the effect of shortening the working day. It was a punitive rate. As the Trial Court found, "stevedoring companies never worked any more 'overtime' than was necessary, because it was more economical for the steamship company and more profitable to the stevedores to work during 'straight time hours' ". (Record, 602)

By the test of the parties' intention, it was a true overtime rate, for as the testimony shows, over a period of years, both the union and the employers in their negotiations and in their communications to their members, treated the night rate as an overtime rate (Record, 434, *et seq.*).

In this connection, it must be remembered that labor negotiations are usually carried on by laymen and not by lawyers and that their contracts are not always drawn with legalistic precision, but these laymen know what they are negotiating about and whether the terms they use be precise or imprecise, they know what these terms mean.

In point of fact, night rates were referred to as overtime rates in the collective agreements between the years

1919 and 1929. They were again referred to as overtime from 1938 on. Since the contractual rate was a true overtime rate, it could not be the regular rate.[1]

(b) The contractual overtime rate was not a shift differential, as contended by respondents, and therefore there was no basis for holding it to be a regular rate. The attempt to convert the contract overtime rate of 150 percent of the regular rate, into a shift differential does violence to the statute and is as erroneous as it would be to convert a shift differential into an overtime premium.

There is a clear distinction and a vast difference between the two in the industrial life of our country. The record shows and the trial judge found that:

> "A shift differential is a premium payment for work in either the second or third shift in a plant or industry where more than one shift is worked. The shift differential for the second shift is usually 5 cents or 10 cents per hour, and seldom exceeds 15 cents per hour.

1. If is perhaps important to note that the court below may have been laboring under a misapprehension concerning the significance of the use or failure to use the word "overtime" in the collective agreements. In the opinion of the court below appears the following:

> "The annual collective agreements made with this union since 1921 have provided for a 'basic working day' of eight hours and a 'basic working week' of forty-four hours. Beginning in 1918, these agreements fixed two sets of hourly rates: (1) Specified hourly rates were set for 'work performed from 8 A.M. to 12 Noon and from 1 P.M. to 5 P.M., Monday to Friday inclusive, and from 8 A.M. to 12 Noon Saturday.' (2) With a few exceptions, one and one-half times these rates, were fixed for what the agreements called 'all other time.' In the Fall of 1938, after the enactment of the Fair Labor Standards Act, the agreement changed the labels for these respective periods: The first was now called 'straight time'; the second was now called 'overtime rates.' This nomenclature was thereafter used in the agreements and is contained in the agreements for the years involved in these suits. No other significant changes were made in the agreements after the Act went into effect." Reported at 162 F. 2d 665.

It would appear, to judge from this quotation, that the court below was unaware of the constant use of the word "overtime" in the agreements between the parties from 1919 to 1929. (See Agreements from 1916 to 1943 forming part of Defendants' Exhibit A.)

> "There is a difference between a shift differential and overtime premium. The former is an amount added to the normal rate of compensation, which is large enough to attract workers to work during what are regarded as less desirable hours of the day, and yet not so large as to inhibit an employer from the use of multiple shifts. The latter is an addition to the normal rate of compensation, designed to inhibit or discourage an employer from using his employees beyond a specified number of hours during the week or during certain specified hours of the day. A safe guide for distinguishing between the shift differential and the overtime premium is by the degree of spread between the normal rate and the penalty rate. Whereas a shift differential is usually 5 or 10 cents per hour, the overtime premium is generally 50 per cent of the normal rate." (Record, 605-606).

The Court below held that the findings of the trial judge are supported by the evidence in these words:

> "In the instant case, the 'actual fact' concerning the 'regular rate' appears in the findings of the trial judge which are supported by the evidence and which we understand the defendants do not dispute." Reported at 162 F. 2d 665.

(c) The intention of the union and the employers to set up a true overtime rate as distinguished from a regular rate can be seen not only from the intrinsic nature of the agreement itself, and the history of the agreements, but from the contemporaneous acts of the same negotiating committees when they deliberately provided different treatment where true shifts and not overtime was involved.

Under the system of collective bargaining which prevailed, the negotiating committee for the I.L.A. and the employers negotiated and concluded eight different agree-

ments dealing with different crafts. (See booklet, "Agreements negotiated by the New York Shipping Association with the International Longshoremen's Association for the Port of Greater New York and Vicinity, effective October 1, 1943", which forms a part of Defendants' Exhibit A.) Among those crafts was one having to do with Port Watchmen, who are members of a local of the I.L.A. Unlike services of the workers covered by the General Cargo Agreement involved in this suit, and the other agreements, the services of the Port Watchmen are regularly required around the clock. The terms and conditions for this large section of the membership of the I.L.A. were negotiated contemporaneously with the negotiation of the General Cargo Agreement by the same committees for both the union and the employers. Here the parties desired to provide for shifts. Accordingly, they negotiated an agreement—as they had done in previous years—setting up three regular shifts. The parties there used language common to industry, and provided as follows:

> "The basic working day shall consist of three shifts of eight (8) hours each, from 8 A.M. to 4 P.M., 4 P.M. to 12 Midnight, and 12 Midnight to 8 A.M. • • •" (See page 33 of booklet of Agreements referred to, *supra*.)

They provided for the same rate of pay for each of the shifts, without any differential in pay whatever, but provided for overtime at time and a half for hours worked outside the regular shifts, whether such hours were in excess of 40 or not.

The parties knew the difference between the branch of work in their industry where shifts were regularly worked, and where there were no shifts.

There is, of course, no element of regularity in night work in the longshore industry of such a nature as would justify calling night work a shift. As the trial court found: "The amount of work which may be available for longshoremen in the Port of New York, and the time of the day, or the day of the week when said work may be available, depend principally upon the number of ships in port and the length of their stay, and varies from day to day, week to week and season to season" (Record, 601), and "the casual character of the work is reflected both in the difficulty of finding employment, the irregularity of the hours of beginning and stopping work, and in the uncertainty of the duration of employment during any specified period. In these respects the work pattern of longshoremen is unique" (Record, 599).

III

The court below further erred in its application to these cases of the pertinent decisions of the Supreme Court. None of the cases relied on by the court below, have a substantial factual relationship to the instant cases.

In *Walling* v. *Youngerman Reynolds Hardwood Company;* 325 U. S. 419, the court found that the "regular rate" was never paid. In our cases, no matter how the regular rate be defined, it is clear that it was paid to everybody who worked in the industry.

In *Walling* v. *Harnischfeger Corporation,* 325 U. S. 427, the question involved was whether the incentive rate above the basic rate should be included in figuring overtime. The rule in the *Harnischfeger* case therefore would apply to the instant cases only if the night rate was conceived to be an incentive rate for the purpose of securing greater pro-

duction—a contention that has at no time been advanced by the plaintiffs.

In *Walling* v. *Helmerich & Payne*, 323 U. S. 37, the question of a split tour of duty was involved, so that the court was led to observe "only in the extremely unlikely case where an employee's tours total more than 80 hours a week, did he become entitled to any pay in addition to the regular tour wages" previously received and further, at page 40, "the plan provided for a fictitious regular rate consisting of a figure somewhat lower than the rate actually received". There is no contention in our cases that any rate in controversy is a fictitious rate.

149 Madison Avenue Company v. *Asselta*, 331 U. S. 199, presents a set of facts which bear no relation to those in our case. There is a wide degree of difference as is indicated by the language of the Supreme Court at page 209:

> "* * * the agreement in this case was one calling for a work week in excess of 40 hours, without effective provision for overtime pay until the employees had completed the scheduled work week and that the 'hourly rate' derived from the use of the contract formula, was not the 'regular rate' of pay within the meaning of the F.L.S.A."

In referring to the *Asselta* case the court below said:

> "As recently as May of this year, the Supreme Court, in a unanimous opinion by Chief Justice Vinson—confirming what had been said previously by this Court and by several other inferior courts—decided that the *Belo* case doctrine must be limited to agreements which contained a 'provision for a guaranteed weekly wage with a stipulation of an hourly rate', and that other types of agreement, whether or not a result of collective bargaining, cannot, by their terms, determine what is the 'regular rate' named in the Act. That 'regular rate',

said the court, is an 'actual fact'. *See 149 Madison Avenue Company* v. *Asselta*, — U. S. — (May 5, 1947)". Reported at 162 F. 2d 665.

We respectfully submit that the court below erred in its reading of the *Asselta* case.

Overnight Motor Transportation Company v. *Missel*, 316 U. S. 572, presented a situation where the employees worked irregular hours at a fixed weekly wage and the question was one of computing their hourly rate from their weekly rate. But in our case, no such computation is involved, since the hourly rates are specified.

The court below apparently gave some weight to *Cabunac* v. *National Terminals Corporation*, 139 F. 2d 853 (C.C.A. 7) (Record, 657-658). But in the *Cabunac* case the primary issue concerned a 1,000 hour clause under Section 7b of the Act and the court held that the 1,000 hour clause did not constitute an allowed exemption from the overtime provisions of the Act. Moreover, the language of the Seventh Circuit Court in the *Cabunac* decision referred to a situation where the differential between the regular rate and the so-called overtime rate was 17 percent—only 10 cents per hour. The court's opinion there, therefore, says that "it seems evident to us as it did to the District Court, that the 'overtime' rate was merely the higher rate necessary to induce defendant's employees to accept employment at hours which were not very desirable from a workmen's standpoint, and that this rate is the 'regular rate' to be paid for work on the night shift". This would appear to be a case of a shift differential and sheds no light on a situation such as ours where the difference between the day rate and the night rate was 50 percent, and where the trial judge found as a fact that there is a vast difference between a shift differential and a 50 percent overtime premium (Record, 605, 606).

Reasons for Granting the Writ

1. The instant cases present issues which have not before been passed on by this court. These issues are of far-reaching consequence, not only in the longshore industry, but in other industries with like collective bargaining histories and contracts, and an early determination by this court of the issues involved, would appear to be in the interest of sound and peaceful labor relations.

2. Review of the judgments below is necessary because in our view the decision below is incorrect in that it failed to give proper weight to a bona fide collective agreement and assimilated the employer-employee relations in the longshore industry to situations where there had been either:

   a. A taint of attempted evasion of the F.L.S.A.; or

   b. Overtime compensation arrangements which were entered into after the Act went into effect and which were astutely devised to retain prior rates of pay.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitioners' petition for writs of certiorari should be granted.

Respectfully submitted,

International Longshoremens Association,
Amicus Curiae.

LOUIS WALDMAN,
Counsel.

State of New York)
County of New York) ss.:

Before me the undersigned authority for said County in said State personally appeared CHARLES H. GREEN who, being by me first duly sworn stated on oath that on this day of October, 1947, he deposited in the United States mail copies of the foregoing Motion and Brief correctly addressed to Philip B, Perlman, Solicitor General, Department of Justice, Washington 25, D. C., counsel for the Petitioner, and to Max R. Simon, Esq., 225 West 34th Street, New York City and to Goldwater & Flynn, Esqs., 50 East 42nd Street, New York City, attorneys for Plaintiffs-Respondents.

CHARLES H. GREEN.

Sworn to and subscribed before me)
this day of October, 1947.)

VINCENT F. O'HARA
Attorney and Counsellor-at-Law
Residing in Bronx County
Bronx County Clerk's No. 2
New York County Clerk's No. 293
Commission Expires March 30, 1949